UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 694

Case No. 769: CHEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Rene Chen, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 30 June 1993;

Whereas, on 25 June and 5 November 1993, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "(1) To order the Secretary-General to implement the recommendations of the JAB Panel.
>
> (2) To order the Secretary-General, in case he does not implement the recommendations of the JAB Panel, to pay to the Applicant an appropriate compensation for the damage resulting from having been eliminated from the G to P examination. This damage includes:
>
> > (a) A loss in salary resulting from the fact that the Applicant would not be promoted to a P-2 post. ..., which would cumulate to an approximate 36,000 dollars by the time the Applicant would reach retirement age.

(b) A loss of pension which ... would cumulate to an approximate 30,000 dollars over the 18 years of remaining life-expectancy after age 60.

(c) The moral injury caused by the failure to recognize the Applicant's knowledge of the English language, ...

(d) The mental anguish of having had to fight against discrimination."

Whereas the Respondent filed his answer on 14 January 1994;

Whereas the Applicant filed written observations on 14 February 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 June 1982, on a three-month fixed-term appointment as a Statistical Clerk at the G-3 level in the Population Division, Department of International Economic and Social Affairs. His appointment was extended for three months and subsequently for three one-year terms. He was promoted to the G-4 level with effect from 1 June 1984, as Senior Statistical Clerk, and to the G-5 level, with effect from 1 June 1985, as a Computer Programming Assistant. On 1 January 1986, his appointment was extended for a four-month term. Subsequently it was renewed for an additional eight-month term. On 1 June 1986, he was promoted to the G-6 level. On 1 January 1987, his appointment was converted to probationary, and on 1 September 1987, it became permanent.

In 1983, the Applicant, a Chinese national, passed the language proficiency examination (LPE) in English. In 1987, he sat for the competitive examination (G to P) in the Electronic Data Processing category (EDP). In accordance with applicable guidelines, he chose to write part of the examination in Chinese, and to sit for a special language test (SLT) in English. He passed the SLT in English and was ranked 5 out of 45 candidates in the EDP occupational group.

In 1989, the Applicant again sat for the G to P examination, and wrote the entire examination in English. He was ranked 6 out of 26 candidates in the EDP occupational group. In 1990, the Applicant sat for the G to P examination in Telecommunication and Engineering. He wrote part of the examination in Chinese and again sat for the SLT in English, which he passed.

On 19 September 1991, the Applicant sat for the G to P examination in the EDP category, writing part of the examination in Chinese, and again taking the SLT in English. In a memorandum dated 10 March 1992, the Chief, Examination and Tests Section, Recruitment and Placement Division, Office of Human Resources Management (OHRM), informed the Applicant that his score on the SLT "did not meet [the] required standard" and that he had been eliminated from the examination process.

In a memorandum dated 13 March 1992, the Applicant asked the Chairperson of the Central Examination Board to allow him to take the oral part of the examination if his EDP test scores met the requirements. He noted that he had written "nearly the entire examination in English, using Chinese only for some summaries and for the section on international affairs" and that he could have taken the entire test in English. He also noted that he had passed the LPE in English in 1983, and had passed the SLT in English on the 1990 G to P examination. On 20 March 1992, the Chairperson of the Central Examination Board replied that because the Applicant had elected to take the SLT in English and did not meet the standard required, he was "not qualified to be considered" for the oral examination.

In a memorandum to the Secretary-General, dated 31 March 1992, the Applicant requested administrative review of the decision to eliminate him from the G to P examination. In a reply dated 12 May 1992, the Director, Staff Administration and Training Division, OHRM, replied that although the Applicant had previously passed the LPE and the SLT, "the purpose of the special language test is to ascertain in an objective manner the current proficiency of the candidates in one of the working languages of the

Secretariat." As he had not passed the 1991 SLT in English he had been properly disqualified from continuing the examination, and the challenged decision would therefore be maintained.

On 2 June 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 10 November 1992, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "10. The Panel considered that Appellant was correct in citing GA-RES-2480B as decisive. Since he had obtained a language proficiency certificate in English, his knowledge of it for official purposes had been confirmed. ST/AI/370 and ST/IC/1991/42 were and are defective in that the requirement for a special language test contradicts the language and intent of the resolution. Respondent is clearly confusing means and ends when arguing that the purpose of the language proficiency examination (LPE) is to establish an entitlement to language allowance, and, like the Examination and Tests Section (ETS), seems to take the view that internal administrative arrangements take precedence over General Assembly resolutions. Respondent correctly points out that after five years Appellant could have been required to sit the LPE again, but fails to draw the proper inference. Since the Administration did not require him to do so and continued to pay him the language allowance, it explicitly recognized his continued proficiency in English.
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> 11. The Panel concluded that the requirement of a special language test was discriminatory, not solely in the case of Appellant, but for all those staff members taking competitive examinations who, like him, had earlier successfully passed the LPE.
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> ...
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> Recommendations
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> 13. The Panel found that, unless remedied, the decision to eliminate Appellant from the competitive examination will have a serious and prejudicial impact on his career.
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> 14. The Panel recommends, therefore, that:
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> (a) ETS reconvene two staff members of the specialized Board to score Appellant's written test and if his grades warrant it, to conduct an oral examination. If his combined score is as high or higher than that of the lowest scoring successful candidate in the examination,

Appellant should be promoted to the professional level, effective the same date as that of the first promotion resulting from the examination;

(b) If, for any reason, the above procedure cannot be followed, Appellant should be granted a special post allowance (SPA) to the professional level from the date of the first promotion resulting from the examination and until the completion of the next competitive examination in the Electronic Data Processing category. If Appellant is successful in that examination, his promotion should be made retroactive to the date of commencement of his SPA;

(c) The administrative instruction (ST/AI/370) be amended to indicate that staff members who have successfully sat the LPE in English or French will not be required to take the special language test. While making this amendment, the remainder of the text should be rewritten in clearer and more precise terms. Future information circulars should reflect the amended text."

On 26 February 1993, the Director of Personnel transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... The Secretary-General cannot accept the recommendations of the Board which are based on your having passed the English language proficiency examination (LPE) in 1983. Success in the LPE examination is not a substitute for success in the SLT test, since those two sets of examinations fulfil two entirely different objectives: briefly, the LPE tests knowledge to read and understand a passive language while the SLT seeks to test the ability of candidates to work in English or French, the two working languages of the Secretariat. The Secretary-General also notes that [the] JAB recommendations are unacceptable since they would, in essence, exempt you from the SLT and thus result in unequal treatment with respect to other candidates who may have passed the LPE or the SLT in English or French in previous years, but who were asked to sit once again for the SLT in 1991 in accordance with ST/AI/370. He has decided, therefore, to maintain the contested decision and to take no further action on your case."

On 3 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has established his proficiency in English by passing the language proficiency test established pursuant to General Assembly resolution 2480 (XXIII) B of 21 December 1968. Requiring him again to establish such competence is inconsistent with that resolution, and violates his rights.

2. The current rules of the G to P examination discriminate against non-native English or French speakers, which violates the intent of General Assembly resolution 37/235 D.

Whereas the Respondent's principal contentions are:

1. The conditions for the G to P examination are specified in administrative instructions which bind staff competing for the examinations.

2. The conditions for the G to P examination are not inconsistent with General Assembly resolution 2480 (XXIII) B which establishes a language incentive scheme to encourage greater linguistic proficiency of the Secretariat and does not purport to regulate the conditions for promotion to the Professional category from other categories.

The Tribunal, having deliberated from 11 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board (JAB). He argues that he has established his proficiency in English by having passed the language proficiency examination (LPE) established pursuant to General Assembly resolution 2480 (XXIII) B. Hence, any decision requiring him to re-establish his language proficiency through a different test is inconsistent with that resolution and violates his rights. Consequently, he asks the

Tribunal to implement the recommendations of the JAB and, in the alternative, to award him appropriate compensation for the damage he suffered from having been eliminated from the examination.

II. The central issue in this case is whether the Applicant's rights were violated by the administrative decision to eliminate him from the examination because he chose to take and failed the special language test (SLT) despite having passed the English language proficiency examination (LPE). This issue must be considered both in the light of General Assembly resolution 37/235 and administrative instruction ST/AI/370, dealing with the G to P examination. The relevant provisions are set forth below:

General Assembly resolution 37/235 D of 21 December 1982:

> "Requests the Secretary-General to permit candidates participating in competitive examinations for passage from the General Service category to the P-1 and P-2 levels of the Professional category to take the examination in any of the working languages of the regional commissions, with due regard to the proficiency requisite of the working languages of the Secretariat."

Administrative instruction ST/AI/370 (paragraph 25) of 21 May 1991:

> "In accordance with General Assembly resolution 37/235 D, candidates participating in the examination shall be permitted to take the examination in any of the working languages of the regional commissions, with due regard to the requisite proficiency in one of the working languages of the Secretariat. In order to demonstrate such proficiency, all candidates will have to take section II of the general paper in either English or French. Alternatively, candidates may elect to take the whole written examination in a working language of a commission other that English or French and to sit for a special language test in either English or French. ..."

Information circular ST/IC/1991/42 (paragraph 5), of 1 July 1991, reiterates the provisions of ST/AI/370.

The Tribunal considers that this instruction clearly specifies that candidates must take the examination either in

English or French. Alternatively, if a candidate elects to use another working language of the United Nations, he or she must successfully pass a SLT in English or French.

III. The Tribunal agrees with the Respondent's submission that General Assembly resolution 2480 (XXIII) B, of 21 December 1968, does not deal with the conditions for promotion from the General Service to the Professional category. This resolution sets forth, inter alia, the linguistic requirements for recruitment and promotion of staff in the Professional category subject to geographical distribution.

The Tribunal will not enter into a discussion of the reasons that might have motivated the language requirements for staff seeking promotion from the General Service to the Professional category. These promotions are permitted solely by competitive examination. (Cf. Judgement No. 266, Capio (1980)). The examination encompasses language requirements, by virtue of the General Assembly request to the Secretary-General, contained in its resolution 37/235 D of 21 December 1982, quoted above.

The Tribunal will confine itself to an analysis of the relevant texts, which are General Assembly resolution 37/235 D and administrative instruction ST/AI/370. General Assembly resolution 2480 (XXIII) B is not relevant as it does not apply to staff sitting for the competitive examination.

IV. The Applicant claims that since he demonstrated his proficiency in English by passing the LPE, his knowledge of English for official purposes had been confirmed and that requiring him to sit for the SLT was discriminatory. The Tribunal does not agree. The Tribunal believes that the Applicant did not provide proof of discrimination. The inequality that he alleges is inherent in a system of official languages and working languages, which are not the mother tongues of all international civil servants. In fact, it could be said that the Applicant may be in a more favourable position than a large number of candidates. As Chinese is an

official language of the United Nations, he has the option of writing his examination papers in his mother tongue and hence, has an advantage over other candidates whose mother tongue is not an official language of the Organization. Such candidates have no choice but to write the whole examination in English or French.

V. The Tribunal concludes that the requirement set forth in ST/AI/370, that staff not taking the written portion of the competitive examination in English or French must pass a SLT in either of those languages, is a reasonable and proper implementation of the General Assembly's request.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary